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State of New York Public Employment Relations Board Decisions from October 21, 1999

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from October 21, 1999

Keywords

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**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**BROOME COUNTY SHERIFF'S LAW
ENFORCEMENT SUPERVISORS ASSOCIATION,**

Petitioner,

- and -

CASE NO. C-4904

COUNTY OF BROOME (SHERIFF'S DEPARTMENT),

Employer,

- and -

BROOME COUNTY SHERIFF'S PBA,

Intervenor.

**WYSSLING & MONTGOMERY (RICHARD H. WYSSLING of counsel), for
Petitioner**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Broome County Sheriff's Law Enforcement Supervisors Association (Association) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing a representation petition. The Association's petition sought the decertification of the Broome County Sheriff's PBA (PBA) and its own certification as the representative of a unit of certain supervisory employees of the County of Broome (Sheriff's Department) (County). The Director dismissed the petition because the showing of interest (SOI) petition filed simultaneously with the petition did not include a description of the unit the Association

alleged to be appropriate and, therefore, the SOI was not "on a form prescribed by the director" as required by §201.4(b) of our Rules of Procedure (Rules).¹

The Association mailed its petition to PERB on May 25, 1999 and it was received in the Director's office on May 27, 1999. By letter dated June 1, 1999, the Association was notified that its petition was deficient and that the deficiency could not be corrected.

The Association's representative responded by letter dated June 9, 1999, in which he asserted that the information that he had received from PERB had not included any form for an SOI petition. He enclosed an SOI petition which was in compliance with the Rules and argued that if he had been notified of the deficiency immediately, he could have corrected the deficiency in a timely fashion.² The Director, holding that PERB's Rules have always been strictly enforced, found no basis for an exception in this case and dismissed the petition.

The Association argues in its exceptions that the Director's failure to promptly notify it of the deficiency prevented it from correcting the deficiency in a timely fashion,

¹Section 201.4(b) of the Rules provides, in relevant part:

That part of any showing of interest consisting of employee petitions, signed or dated after March 15, 1996, shall be submitted on a form prescribed by the director, which shall include the name of the petitioner, the unit alleged by the petitioner to be appropriate, and shall represent that the showing of interest is in support of the certification and/or decertification petition as applicable.

²The County-PBA contract for the unit which includes the titles sought by the Association expires on December 31, 1999. A petition would have to be filed during the month of May 1999 to be timely. (Rules, §204.3(d)). Since May 31, 1999 was a legal holiday (Memorial Day), a petition could have been filed as late as June 1, 1999. (General Construction Law §25-a.1).

that the showing of interest was in substantial compliance with the requirements of §201.4(b) of the Rules and that the Association should not be penalized for relying on information provided by PERB that did not contain the required form. The County and the PBA have not responded to either the Director's decision or the Association's exceptions.

Based upon our review of the file and consideration of the Association's arguments, we affirm the decision of the Director.

Section 201.4(b) of the Rules, amended in 1996, clearly sets forth the requirements for a showing of interest that takes the form of an employee petition. The Rules specify that the unit sought to be represented must be described on the petition. This is to ensure that the employees signing the petition have been informed of the purpose for the petition and are signing with that knowledge. The requirement is not merely ministerial. It goes to the very essence of the purpose of the showing of interest. Neither is it an ambiguous requirement nor one that could easily be misunderstood. Therefore, we find that the SOI petition submitted by the Association in support of its certification/decertification petition does not substantially comply with the requirements of the Rules.³

It would be disingenuous for the Association's representative who filed the petition, a professional labor relations specialist, to argue that he was unaware of the requirements of PERB's Rules with respect to the filing of a representation petition. The

³*Compare Town of Amherst*, 13 PERB ¶13074 (1980), where a declaration of authenticity that was found to be in substantial compliance with §201.4(d) of the Rules was accepted and subsequently corrected.

requirement is clearly set forth in the Rules. "A party who is ignorant of a requirement under the Rules is no differently situated than a person who is mistaken in his or her understanding of the meaning or application of the Rules."⁴ We have, as noted by the Director, applied our Rules strictly, especially the Rules pertaining to showing of interest requirements.⁵

As to the remaining exceptions filed by the Association, we find them to be without merit. Following regular office procedure, the Director sent a letter notifying the Association of the deficiency on the second business day after receipt of the petition. The Association argues that the Director had an obligation to telephone or e-mail its representative to tell him about the deficiency. The Director is under no such obligation to use extraordinary means to notify a party about the processing of a petition.⁶ As to the urgency expressed by the Association because of the filing period rapidly expiring, we only note that the signatures on the original SOI petition are dated in March 1999. Therefore, the Association could have filed the petition at any time after May 1, 1999. By waiting until May 25, the Association itself severely limited the time frame in which it could have timely corrected any deficiencies with the petition. The manner in which the Director processed the petition affords the Association no grounds for reversing his dismissal of the petition.

⁴*Suffolk County BOCES III*, 25 PERB ¶3020, at 3042 (1992).

⁵*See Jamesville-Dewitt Cent. Sch. Dist.*, 31 PERB ¶3049 (1998); *New York Convention Ctr. Operating Corp.*, 20 PERB ¶3063 (1987); *City Sch. Dist. of the City of Schenectady*, 20 PERB ¶3008 (1987).

⁶*See Jamesville-Dewitt, supra.*

The Association also argues that it used a computer floppy diskette of PERB forms, created by PERB and made available for purchase by those who appear before the agency. The diskette does not, asserts the Association, contain an SOI petition form. That assertion is in error. The diskette contains the SOI petition form; indeed, the Association's representative apparently used that computer version of the form to file a corrected SOI petition with the Director on June 7, 1999. In any event, the original SOI petition that the Association's representative used requires a description of the unit the petitioner seeks to represent; that section of the Association's original SOI petition is blank.

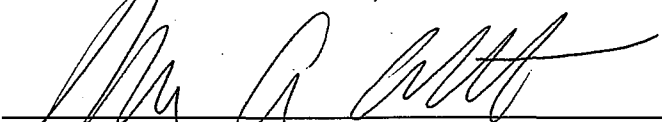
Based on the foregoing, we deny the exceptions filed by the Association and we affirm the decision of the Director.

IT IS, THEREFORE, ORDERED that the petition must be, and it hereby is, dismissed.

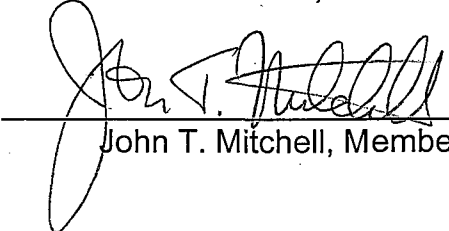
DATED: October 21, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

BINGHAMTON POLICE SUPERVISORS ASSOCIATION,

Petitioner,

- and -

CASE NO. C-4905

CITY OF BINGHAMTON,

Employer,

- and -

BINGHAMTON PBA,

Intervenor.

**WYSSLING & MONTGOMERY (RICHARD H. WYSSLING of counsel), for
Petitioner**

**ASWAD & INGRAHAM (RICHARD N. ASWAD, ESQ. of counsel), for
INTERVENOR**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Binghamton Police Supervisors Association (Association) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing a representation petition. The Association's petition sought the decertification of the Binghamton PBA (PBA) and the Association's own certification as the representative of a unit of certain supervisory employees of the City of Binghamton (City). The Director dismissed the petition because the showing of

interest (SOI) petition filed simultaneously with the petition did not include a description of the unit the Association alleged to be appropriate and, therefore, the SOI was not "on a form prescribed by the director" as required by §201.4(b) of our Rules of Procedure (Rules).¹

The Association mailed its petition to PERB on May 25, 1999 and it was received in the Director's office on May 27, 1999. By letter dated June 1, 1999, the Association was notified that its petition was deficient and that the deficiency could not be corrected. The Association's representative responded by letter dated June 9, 1999, in which he asserted that the information on the computer diskette that he had purchased from PERB had not included any form for an SOI petition. He enclosed an SOI petition which was in compliance with the Rules and argued that if he had been notified of the deficiency immediately, he could have corrected the deficiency in a timely fashion.² The

¹Section 201.4(b) of the Rules provides, in relevant part:

That part of any showing of interest consisting of employee petitions, signed or dated on or after March 15, 1996, shall be submitted on a form prescribed by the director, which shall include the name of the petitioner, the unit alleged by the petitioner to be appropriate, and shall represent that the showing of interest is in support of the certification and/or decertification petition as applicable.

²The City-PBA contract for the unit which includes the titles sought by the Association expires on December 31, 1999. A petition had to be filed during the month of May 1999 to be timely. (Rules, §204.3[d]). Since May 31, 1999 was a legal holiday (Memorial Day), a petition could have been filed as late as June 1, 1999. (General Construction Law §25-a.1).

Director, holding that PERB's Rules have always been strictly enforced, found no basis for an exception in this case and dismissed the petition.

The Association argues in its exceptions that the Director's failure to notify it promptly of the deficiency prevented it from correcting the deficiency in a timely fashion, that the showing of interest was in substantial compliance with the requirements of §201.4(b) of the Rules, and that the Association should not be penalized for relying on information provided by PERB that did not contain the required form. The PBA supports the Director's decision. The City has not responded to either the Director's decision or the Association's exceptions.³

Based upon our review of the file and consideration of the Association's arguments, we affirm the decision of the Director.

The facts of this case are nearly identical to the facts in Case No. C-4904, *County of Broome (Sheriff's Department)*, decided by us today. In that case, we held that the SOI petition submitted by the Association in support of its certification/decertification petition did not substantially comply with the requirements of the Rules.⁴ We there noted that we have applied our Rules strictly, especially the Rules

³The City inquired regarding its continuing duty to negotiate with the PBA during the pendency of this case but stated no exceptions to the Director's decision in its letter of inquiry.

⁴*Compare Town of Amherst*, 13 PERB ¶13074 (1980), where a declaration of authenticity that was found to be in substantial compliance with §201.4(d) of the Rules was accepted and subsequently corrected.

pertaining to showing of interest requirements,⁵ and that, as to the remaining exceptions filed by the Association, we found them to be without merit.

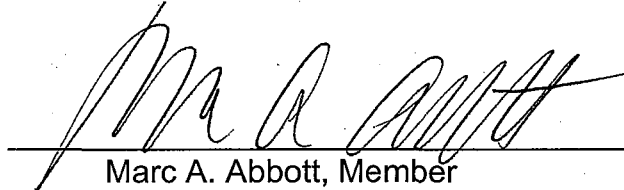
For the reasons set forth in that decision, we deny the exceptions filed by the Association and we affirm the decision of the Director.

IT IS, THEREFORE, ORDERED that the petition must be, and it hereby is, dismissed.

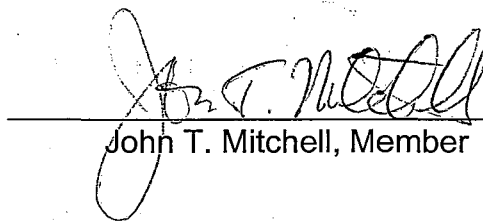
DATED: October 21, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁵See *Jamesville-Dewitt Cent. Sch. Dist.*, 31 PERB ¶3049 (1998); *New York Convention Ctr. Operating Corp.*, 20 PERB ¶3063 (1987); *City Sch. Dist. of the City of Schenectady*, 20 PERB ¶3008 (1987).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**UTICA PROFESSIONAL FIRE FIGHTERS
ASSOCIATION, LOCAL 32, IAFF,
AFL-CIO-CLC,**

Charging Party,

- and -

CASE NO. U-18370

CITY OF UTICA,

Respondent.

GRASSO & GRASSO (JANE K. FININ of counsel), for Charging Party

**ROEMER WALLENS & MINEAUX LLP (MARY M. ROACH of counsel), for
Respondent**

BOARD DECISION AND ORDER

The City of Utica (City) has filed exceptions to an Administrative Law Judge's decision on an improper practice charge. The Utica Professional Fire Fighters Association, Local 32, IAFF, AFL-CIO-CLC (Association), the charging party, has responded to the City's exceptions and filed cross-exceptions to which the City has responded.

The charge alleges that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally directing its fire fighters to take a physical exam conducted by a City-designated doctor, and by announcing that it would

terminate those who failed the exam. The charge also alleges that the City violated the Act by refusing to negotiate the Association's demands to bargain specific subjects related to the City's directive. The parties stipulated that the Association demanded to bargain the following subjects: examination by a doctor of the employee's own choice at the City's expense; confidentiality of the medical reports; remaining in payroll status regardless of the results of the exams; the ability to attempt to "requalify" while still on the payroll; pre-testing, testing, post-testing, and re-testing procedures; new standards of conduct for employment and penalties; and the impact of the City's decision to do the physicals. The Association did not allege that the decision to examine was a mandatory subject of bargaining. The parties also stipulated that the City had never before done exams like these and that the parties did not negotiate about them.

After a hearing,¹ the Administrative Law Judge (ALJ) found that the City violated the Act as alleged and that the subjects of the unilateral change and demands were all mandatory subjects of negotiation. The ALJ also found that the relevant regulation of the federal Occupational Safety and Health Administration (OSHA), 29 C.F.R. §1910.134(b)(10), as adopted by the State Commissioner of Labor (Commissioner) as New York's standard for public employees (OSHA regulation), did not preempt negotiations.

¹The ALJ originally conditionally dismissed and deferred the charge to the parties' grievance procedures. 30 PERB ¶4689 (1997). We reversed. 31 PERB ¶3039 (1998).

When the Association filed the charge, the OSHA regulation stated that persons should not be assigned tasks that require the use of respirators unless the employer has determined that they are physically able to perform the work and use the equipment. It also required "the local physician" to decide what health and physical conditions were pertinent to making that determination, and required employers to review "periodically" the status of employees who use respirators. In June 1996 the State Department of Labor (DOL) issued a Notice of Violation of the OSHA regulation to the City, and ordered it to comply by December 1996.

The City argues that for a variety of reasons the relevant subjects of negotiation are not mandatory. Among these arguments, the City contends that to have the DOL order the exams, and then have PERB order bargaining about them to the point of interest arbitration, which could take years to complete, would interfere with the City's mission to deliver fire fighting services. The City also objects to various parts of the remedy the ALJ ordered. The Association argues in response that all of the subjects at issue are mandatory, and it objects to other parts of the remedy. After reviewing the record and the parties' arguments, we affirm the ALJ's decision on the merits and we modify the remedy.

The negotiability of the City's decision to do these exams is not generally at issue. The only issue is whether the subjects of the Association's bargaining demands and the subjects affected by the unilateral changes the City made are mandatory. The ALJ correctly held that the subjects affected by the implementation of the City's

November 6, 1996 directive² to take these physical exams — procedures,³ choice of doctor,⁴ cost of the exam,⁵ consequences of failing a medical exam,⁶ confidentiality of medical exam results,⁷ sick leave and its use,⁸ and new requirements for continued employment⁹ — are all mandatory. In addition to these subjects, the others about which

²Communication No. 96-50 from Fire Chief Mazza to all members of the Bureau of Fire announced that Dr. Mark Zongrone would administer physical exams to all members of the Bureau starting on November 12, 1996, at the Central Fire Station; that all information concerning the exams would be held confidential; and that problems resulting from exam determinations would be “handled” under Article III, Section 1, of the parties’ contract.

³*County of Nassau (Nassau County Police Dep’t)*, 27 PERB ¶3054 (1994); *City of Cohoes*, 25 PERB ¶3042 (1992); *City of Schenectady*, 19 PERB ¶3051, *conf’d*, 135 Misc.2d 1088, 19 PERB ¶7023 (Sup. Ct., Albany County, 1986), *aff’d*, 132 A.D.2d 242, 20 PERB ¶7022 (3d Dep’t 1987).

⁴*Police Ass’n of New Rochelle, New York, Inc.*, 13 PERB ¶3082 (1980).

⁵*City of Rochester*, 12 PERB ¶3010 (1979) (costs for duty-related medical services). See *Newark Valley Cent. Sch. Dist.*, 18 PERB ¶3056 (1985) (health insurance contributions). The ALJ generally found that all the subjects at-issue were mandatory, but did not make a specific finding about payment for the cost of the exam.

⁶*County of Nassau, supra*; *City of Cohoes, supra*.

⁷*Bd. of Educ. of the City Sch. Dist. of the City of New York v PERB*, 75 N.Y.2d 660, 23 PERB ¶7012 (1990) (holding disclosure of health information mandatory); see *County of Nassau, supra*; *County of Rensselaer*, 13 PERB ¶3080 (1980).

⁸*Village of Spring Valley Policemen’s Benevolent Ass’n*, 14 PERB ¶3010 (1981); *Town of Haverstraw*, 11 PERB ¶3109 (1978), *conf’d in relevant part sub nom. Town of Haverstraw v. PERB*, 12 PERB ¶7007 (Sup. Ct., Rockland County, 1979), *aff’d*, 75 A.D.2d 874, 13 PERB ¶7006 (2d Dep’t 1980).

⁹*City of Mount Vernon*, 18 PERB ¶3020 (1985). See *City of Peekskill*, 12 PERB ¶3100 (1979).

the Association also demanded bargaining — a second chance to establish fitness while remaining on the payroll¹⁰ and the impact on employees of the City's decision to test them¹¹ — are also mandatory. Employees' collective and individual interests in all these subjects outweigh any associated managerial prerogatives.¹²

Therefore, contrary to the City's argument, the ALJ correctly saw this case as analogous to *County of Nassau*, where we held that the procedures implementing a decision to do drug tests, including the consequences for employees, are mandatorily negotiable. As with all negotiability determinations, we base these determinations on the subject matter, not on whether the City is implementing this decision on its own initiative or because of a statutory or regulatory requirement. The employer's reason for making the decision to be implemented is immaterial to this negotiability analysis.

As the ALJ found, because all these subjects were mandatory, the City violated the Act, unless some other defense it raises has merit. One of the City's main arguments in its exceptions is that it is "senseless" to require it to negotiate about the

¹⁰*County of Nassau, supra*.

¹¹*Id.* The DOL required the City, under 29 C.F.R. §1910.134(b)(10), to determine that persons assigned tasks using respirators were physically able to do the work and use the equipment. The City's decision to test, to that extent, was not a mandatory subject of negotiation.

¹²*County of Nassau, supra*, at 3119-20. Contrary to the City's argument in support of its exceptions, the inability to determine a fire fighter's fitness to use a respirator would not affect the City's mission to protect the life and property of the citizens of the City. The City fulfilled that mission for years without, as stipulated, having ever made that determination. In any event, this case mainly involves only the implementation of the decision to make that determination, not the decision itself.

procedures for respirator fitness exams. It contends that because any impasse in negotiations must go to interest arbitration,¹³ any duty to bargain here will effectively preclude its "ability to meet federally mandated safety requirements." We cannot agree.

Political subdivisions of the states are not employers within the meaning of the United States Occupational Safety and Health Act, 29 U.S.C. §651 et seq. See 29 U.S.C. §652 (5) - (7). However, as the State Legislature requires in Labor Law §27-a, the State Commissioner of Labor adopted 29 C.F.R. §1910.134(b)(10) as a safety standard that applied to the City's public employees at the time at issue in the charge.¹⁴ Under those provisions, the DOL issued to the City the June 1996 order at issue here.¹⁵ For the reasons that follow, we find that the DOL's enforcement of the New York State Labor Law is compatible as a matter of law with our enforcement of the Act.

As it existed in 1996, the regulation at issue only barred a public employer from assigning work requiring a respirator to an employee determined unfit to use a respirator. It otherwise mandated only that "[t]he local physician" shall determine what health and physical conditions are pertinent to making that determination, and that this determination should be reviewed periodically. Nothing in the regulation mandated the

¹³See Act §209 (4).

¹⁴12 NYCRR 800.3.

¹⁵As authorized by federal statute, the Legislature has required the State to assume responsibility for enforcement of the federal regulation as to public employees in New York State. Labor Law §27-a (3)(c).

type of physical examination, the identity of the examining physician, the procedures, or any of the other features of the process that the City unilaterally implemented.

The duty to bargain under the Act may be preempted by plain and clear legislative intent or by a statute indicating an "inescapably implicit" legislative design to preclude bargaining.¹⁶ Therefore, the OSHA regulation at most preempted bargaining about a decision to do respirator fitness exams, using a local physician with the authority, under the regulation, to determine the criteria of fitness. But the regulation was no evidence of a plain and clear legislative intent to preempt bargaining about procedures to implement that decision.

Neither was that regulation evidence of an implicit legislative design to preclude bargaining. On the contrary, various features of Labor Law §27-a, as well as the DOL's regulations implementing the Commissioner's adoption of the OSHA regulation, indicate that the Legislature and the DOL accommodated the need for flexibility when applying that regulation to the public sector. The substance of the DOL's compliance order is subject to review by the Industrial Board of Appeals (IBA), and any decision of the IBA is subject to judicial review under CPLR Article 78.¹⁷ As to the date by which the DOL orders that the public employer must comply, the DOL's regulations authorize the employer to file with the Commissioner a petition to modify the abatement date in a compliance order if the employer has not complied with the order due to factors beyond

¹⁶*Schenectady Police Benevolent Ass'n v. PERB*, 85 N.Y.2d 480, 486, 28 PERB ¶7005, at 7012 (1995).

¹⁷Labor Law §27-a (6)(c).

the employer's "reasonable control."¹⁸ The regulations require the employer to post a notice of any modification petition and to notify the authorized representative of any affected employees by personal delivery or certified mail.¹⁹ The regulations also permit affected employees or their authorized representatives to file written objections to a modification petition, and the Commissioner's decision on a petition is subject to review by the IBA and the courts.²⁰ In addition, affected employees and their authorized representatives may themselves petition to contest the abatement period stated in a Notice of Violation and Order to Comply, if they believe the period is unreasonable.²¹ Here, too, the Commissioner's determination of the petition is subject to review by the IBA and the courts.²² Therefore, even if negotiations about implementing the OSHA regulation had reached a lengthy impasse, the relevant statute and regulations set out a comprehensive scheme capable of accommodating the parties' duty to bargain under the Act, even during the course of an interest arbitration proceeding. Those provisions also provided for full administrative and judicial review of any claim an employer may have had that it could not comply with the DOL's order because of the employer's duty

¹⁸12 NYCRR 804.1. The parties stipulated that "the City was permitted to apply for an extension of time within which to comply."

¹⁹12 NYCRR 804.4.

²⁰12 NYCRR 804.8 (a); Labor Law §§101-102.

²¹12 NYCRR part 805. The compliance order here also states that "[a]n employee (or an authorized employee representative) may object to the abatement date set for a violation if the employee believes the date to be unreasonable."

²²12 NYCRR 805.6.

to bargain under the Act. Therefore, we see little, if any, risk of any of the conflicts or consequences that the City predicts would result if it were required to bargain.

The City also argues that it has never permitted physically unfit fire fighters to work, and that, therefore, the respirator fitness exam requirement is not new. This argument fails to distinguish between procedures for determining fitness and the results of any determination. In any event, the parties stipulated that "[s]uch physical examinations . . . have not heretofore been conducted by the City." Therefore, the procedures at issue, regarding the implementation and aftermath of those examinations, are new procedures.

The record also does not support the City's argument that certain provisions of its collective bargaining agreement with the Association, Article III (Leaves of Absence) and Article VIII, Section 4 (Grievances) already addressed the eventualities about which the Association sought to negotiate. We determined earlier in this proceeding that neither Article III nor Article VIII is a source of right to the Association.²³ In addition, the City's directive extended the scope of Article III, Section 1, of the contract to "problems" resulting from respirator exams that the City had never before conducted. Thus, these contract provisions did not previously address the new circumstances about which the Association sought to negotiate. Moreover, the Association did not demand to bargain about either the right to grieve disputed respirator fitness determinations under the contract, or compensation for fire fighters either injured in the

²³31 PERB ¶3039 (1998).

performance of their duties or taken sick as the result of the performance of their duties, and the City's actions otherwise affected noncontractual terms and conditions of employment. For these same reasons, the record does not support the City's argument that it had no duty to bargain because the Association sought protections or benefits redundant of those already conferred by statute.²⁴

Therefore, we sustain none of the City's arguments in support of its exceptions, and we affirm the ALJ's merits determinations.

We turn now to the issue of a remedy. In 1998, after the charge was filed, the DOL and OSHA regulations governing respirator fitness were substantially amended.²⁵ The amended regulations were made part of the record, and the ALJ gave the parties an opportunity to submit briefs regarding any impact of those amendments on this charge.²⁶ The parties responded, and the ALJ ended the period of her remedial order at

²⁴In addition, bargaining alternatives to statutory protections and benefits is not prohibited, see, e.g., *Auburn Police Local 195 v. Helsby*, 62 A.D.2d 12, 11 PERB ¶7003 (3d Dep't 1978), *aff'd on opn below*, 46 N.Y.2d 1034, 12 PERB ¶7006 (1979) (alternatives to Civil Service Law §75 disciplinary procedures), and the City has a duty to bargain benefits duplicating statutory provisions. *Board of Coop. Educ. Servs. v. PERB*, 82 A.D.2d 691, 14 PERB ¶7025 (3d Dep't 1981); *City of Cohoes*, 31 PERB ¶3020 (1998).

²⁵See New York State Register, Aug. 19, 1998, Dep't of Labor Notice of Adoption, Public Employee Occupational Safety and Health Standards, I.D. No. LAB-24-98-00025-A, at p. 13.

²⁶The City argues that it had no duty to bargain because of the amendments. If we were to adopt this position, then we would have to judge the lawfulness of respondents' conduct on the basis of statutes and regulations that did not exist at the time covered by a charge. Parties would have no notice of the legal standards that apply to their conduct.

the effective date of any relevant amendments in the regulations, stating that it would be unfair not to take the amendments into account in framing the remedy. She also declined to order bargaining about the Association's demands to the extent that the order would require retroactive bargaining. The Association filed cross-exceptions regarding both of these limitations in the order.

The purpose of the remedial order we must frame is to effect the policies of the Act by putting the Association most nearly in the position it would have been in if the City had not violated the Act. Therefore, we believe the best course is to allow retroactive bargaining, but to limit the period covered in the bargaining order by the effective dates of any relevant amendments. Retroactive bargaining is commonplace in public sector labor relations.

The City also argues that an order to destroy any records created under its unilaterally imposed procedures will put it in noncompliance with any federal regulations that apply. While it has failed to identify any regulation, federal or State, relevant to this argument, it is still appropriate to modify the order to require only the lawful destruction and redaction of those records. We also agree with the City that the record does not support a finding that it unilaterally directed that fire fighters determined unfit to use a respirator were required to exhaust up to 30 days of sick leave before termination.²⁷ Article III, Section 1, of the contract, which the City unilaterally decided would apply to

²⁷The record shows that the City directed that problems resulting from the exam determinations would be "handled" under Article III, Section 1, of the contract, which deals with sick leave.

problems arising from its respirator fitness determinations, states that accumulated sick leave "shall be expended" for days fire fighters are off duty because of illness.

Therefore, there is sufficient evidence to find that the unilateral change the City made involved sick leave. But the evidence is equivocal at best that the City required fire fighters who failed the physical exam to exhaust sick leave before being terminated. We modify the order in that respect.

Finally, the parties stipulated that the City-designated doctor examined all but ten members of the bargaining unit, and that none of the ten "were or are presently subject to regular firefighting duty." To address any possibility that the City might examine those remaining members pursuant to the 1996 directive, we include a cease and desist provision in the remedy.

Therefore, based on the discussion above, we deny the City's exceptions as to the merits. As to the remedy, we grant the City's exceptions and the Association's cross-exceptions, as indicated.

IT IS, THEREFORE, ORDERED that the City of Utica:

1. Rescind the November 6, 1996 requirement that unit members be physically examined by a doctor chosen by the City and pass a physical examination and medical evaluation, the methodology, scope, and details of which the City or its agents determined;

2. Cease and desist from physically examining unit members pursuant to the November 6, 1996 requirement that unit members be physically examined by a doctor

chosen by the City and pass a physical examination and medical evaluation, the procedures, scope, and details of which the City or its agents determined;

3. Remove and destroy from all employment or personnel files kept or maintained by the City or its agents, including Dr. Mark Zongrone, all records and reports created pursuant to such examinations, procedures, and evaluations as it may lawfully remove and destroy under any State or federal law or regulation that applies, and redact so much of any such remaining records and reports as it may lawfully redact under any State or federal law or regulation that applies;

4. Reinstate and make whole for any loss of benefits and wages, with interest at the maximum legal rate, any bargaining unit members who were terminated, required to take sick leave, or otherwise adversely affected in their employment as result of failing a physical examination conducted by the City or its agents pursuant to its November 6, 1996 requirement, and any related procedures and conditions;

5. Negotiate the Association's 1996 demands regarding the pre-testing, testing, post-testing, and re-testing procedures for determining unit members' fitness to use a respirator including: the ability of unit members to be tested by a doctor of the members' choice at City expense; the right to confidentiality of medical reports; the scope, details, and methodology of both the physical examination and medical evaluation; the ability of unit members to remain in payroll status regardless of the results of the physical examination and medical evaluation; the ability of unit members to attempt to requalify for respirator use while on the payroll; penalties for failing the examination; and the requirement that unit members pass the examination as a new

condition for continued employment; from the date of each demand, except, to the extent that any applicable provision of 29 C.F.R. §1910.134 (e) preempts bargaining regarding any such demand in whole or in part pursuant to Labor Law §27-a (4) (a) and 12 NYCRR 800.3, in which case, to the effective date under 29 C.F.R. §1910.134 (n) of any such provision to the extent applicable.

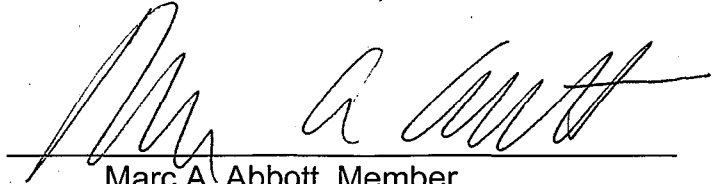
6. Negotiate the Association's 1996 demand regarding the impact of the decision to test for respirator fitness on the terms and conditions of unit members' employment; and

7. Sign and post the attached Notice at all locations at which any unit member works, in places ordinarily used to communicate with or post notices of information to unit employees.

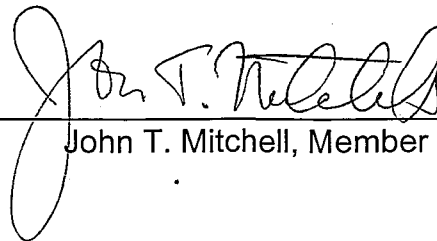
DATED: October 21, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

**PURSUANT TO
THE DECISION AND ORDER OF THE
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD
and in order to effectuate the policies of the
NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT**

we hereby notify all employees of the City of Utica (City) in the unit represented by the Utica Professional Fire Fighters Association, Local 32, IAFF, AFL-CIO-CLC (Association) that the City will:

1. Rescind the November 6, 1996 requirement that unit members be physically examined by a doctor chosen by the City and pass a physical examination and medical evaluation, the methodology, scope, and details of which the City or its agents determined;
2. Not physically examine unit members pursuant to the November 6, 1996 requirement that unit members be physically examined by a doctor chosen by the City and pass a physical examination and medical evaluation, the procedures, scope, and details of which the City or its agents determined;
3. Remove and destroy from all employment or personnel files kept or maintained by the City or its agents, including Dr. Mark Zongrone, all records and reports created pursuant to such examinations, procedures, and evaluations as it may lawfully remove and destroy under any State or federal law or regulation that applies, and redact so much of any such remaining records and reports as it may lawfully redact under any State or federal law or regulation that applies;
4. Reinstate and make whole for any loss of benefits and wages, with interest at the maximum legal rate, any bargaining unit members who were terminated, required to take sick leave, or otherwise adversely affected in their employment as result of failing a physical examination conducted by the City or its agents pursuant to its November 6, 1996 requirement, and any related procedures, and conditions;
5. Negotiate the Association's 1996 demands regarding the pre-testing, testing, post-testing, and re-testing procedures for determining unit members' fitness to use a respirator including: the ability of unit members to be tested by a doctor of the members' choice at City expense; the right to confidentiality of medical reports; the scope, details, and methodology of both the physical examination and medical evaluation; the ability of unit members to remain in payroll status regardless of the results of the physical examination and medical evaluation; the ability of unit members to attempt to requalify for respirator use while on the payroll; penalties for failing the examination; and the requirement that unit members pass the examination as a new condition for continued employment; from the date of each demand, except, to the extent that any applicable provision of 29 C.F.R. §1910.134 (e) preempts bargaining regarding any such demand in whole or in part pursuant to Labor Law §27-a (4) (a) and 12 NYCRR 800.3, in which case, to the effective date under 29 C.F.R. §1910.134 (n) of any such provision to the extent applicable.
6. Negotiate the Association's 1996 demand regarding the impact of the decision to test for respirator fitness on the terms and conditions of unit members' employment

Dated

By
(Representative) (Title)

CITY OF UTICA
.....

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

JOEL FREDERICSON,

Charging Party,

- and -

CASE NO. U-19228

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

JOEL FREDERICSON, *pro se*

**MARTIN B. SCHNABEL, VICE-PRESIDENT AND GENERAL COUNSEL
(DANIEL TOPPER of counsel), for Respondent**

BOARD DECISION AND ORDER

Joel Fredericson has filed exceptions to a June 4, 1999 decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge. The charge, as amended, alleged that the New York City Transit Authority (Authority) violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by disciplining and suspending Fredericson in retaliation for his activities as a member of the Transport Workers Union (TWU) Safety Committee.

Fredericson was the elected vice-chairperson of the TWU track division and served as a TWU member of the track division safety committee. On April 11, 1997, Fredericson responded to a safety complaint from a track worker at a track repair site. The parties dispute whether Fredericson directed a work crew at the site to stop working, after a supervisor refused to provide auxiliary safety flagging. On April 14,

1997, the Authority served Fredericson with a disciplinary action notification for his alleged conduct at the repair site.

Fredericson challenged the disciplinary notification through all of the steps of the grievance procedure in the collective bargaining agreement between the Authority and the TWU, which ends with binding arbitration before a three-member arbitration board. The arbitration board found that Fredericson had improperly attempted to stop the track repair job and had refused multiple directives to leave Authority property. It issued an opinion and award (award) that imposed a 20-day suspension.

In this proceeding, the Authority argued to the ALJ that even though Fredericson reported to the repair site as a TWU representative and his role was to check workplace safety, his activities lost any protection they had under the Act when he attempted to stop the track repair work. The Authority also argued that the doctrine of collateral estoppel applies to the factual findings in the arbitration board's award. In particular, the Authority argued that Fredericson was precluded from relitigating the arbitration board's finding that he attempted to shut down the job.

The ALJ's decision reviews a number of cases that stand for the proposition that a refusal to work based on a bona fide fear of personal injury or future reprisals is a defense to a charge alleging an unlawful strike. Implicitly analogizing to those cases, the decision holds that "if Fredericson, in his role as TWU safety representative, advised the track crew to stop working based upon his good faith belief that it was necessary to do so to protect the crew's safety," that advice would constitute protected activity under the Act.

The ALJ found that the arbitration board rejected Fredericson's defense that he acted in good faith. According to the ALJ, the arbitration board found that Fredericson did not believe that "the track workers were in such danger that it was necessary to stop working and leave the tracks." Applying the doctrine of collateral estoppel, the ALJ held that Fredericson had directed the workers to leave the tracks, not believing that the existing danger made that necessary. Therefore, the ALJ held, Fredericson's attempt to stop the work was not protected.

Fredericson excepts to the ALJ's decision for numerous reasons. Among those reasons, he asserts that the ALJ improperly applied the doctrine of collateral estoppel. The Authority supports the ALJ's decision in all respects.

We now reverse the ALJ's findings, based on collateral estoppel, that Fredericson did not act in good faith, and that therefore the Authority did not violate the Act. We remand this case to the ALJ for further proceedings consistent with this decision.

The doctrine of collateral estoppel precludes a party from relitigating in a later proceeding an issue "clearly raised" in an earlier proceeding and decided against that party.¹ The same issue must have been "necessarily raised and decided" in the earlier proceeding, and must have been material and essential to the decision in that proceeding.² Collateral estoppel or "issue preclusion" applies on an issue-by-issue basis.

¹*Ryan v. New York Telephone Co.*, 62 N.Y. 2d 494, 500 (1984).

²*Id.*

Here, the issue of whether Fredericson told the workers at the track repair site to stop working was clearly raised and material to the award issued in the disciplinary arbitration. Therefore, the ALJ properly applied the doctrine of collateral estoppel to that finding. But the issue of whether Fredericson believed that the track workers were in such danger that they needed to stop working was neither clearly raised in, nor material to, the arbitration. The arbitration award specifically finds that the track repair site appeared safe to Fredericson without the auxiliary flagging. But, noting that Fredericson consistently denied during the arbitration hearing that he asked the crew to stop working, the award also states that "[o]nly if Grievant had testified that he attempted to stop the job on safety grounds would the question of whether that action was warranted, or whether Grievant was acting in good faith even if not correct, have been raised."

Thus, by the terms of the arbitration award itself, the issue of whether Fredericson acted in good faith was not clearly raised at the arbitration, and it was neither material nor essential to the award. Therefore, the ALJ erred by applying the doctrine of collateral estoppel to that issue.

Accordingly, we reverse the dismissal of the charge, and remand the charge to the ALJ. On remand, the ALJ should consider the evidence of whether Fredericson acted in good faith,³ and whether any witness was improperly precluded from testifying because the ALJ found Fredericson was estopped from relitigating that issue. The ALJ

³Our decision does not deny the ALJ discretion to reconvene the hearing as necessary on all aspects of the charge.

should also consider whether the amended charge sufficiently pleads, as Fredericson's exceptions suggest, that taking pictures of the alleged unsafe conditions at the job site on April 11, 1997, was a protected activity under the Act for which the Authority unlawfully disciplined him.

Because Fredericson's remaining exceptions may relate to the processing of this charge on remand, we decide them now as follows:

Under the "good faith" standard for finding protected activity, which the ALJ applied, the ALJ did not need to make a determination, as Fredericson contends, regarding the level of danger that actually existed at the job site on April 11, 1997.

In addition, the ALJ did not abuse her discretion by refusing to admit testimony that she found was collateral. Neither did the ALJ abuse her discretion in refusing to admit certain tape recorded evidence, except as it was material to this proceeding. The ALJ also did not err in allowing a witness, whom the Authority later called, to be present in the hearing room without prior notice to Fredericson that the witness would testify.⁴ Fredericson knew that the witness had signed the at-issue disciplinary notification and therefore was a potential witness, and our Rules do not require such notice.

For the reasons stated in the ALJ's decision, we also reject Fredericson's contention that he did not receive a full and fair hearing before the arbitration board. In addition, we do not reach his exception asserting that the single, inappropriate remark

⁴See *West Genesee Cent. Sch. Dist.*, 24 PERB ¶13038 (1991).

the ALJ made at the PERB hearing, on which Fredericson relies, is evidence of a bias against him.⁵

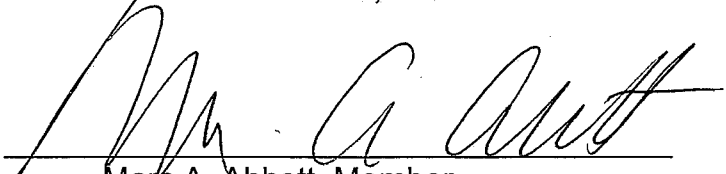
Finally, Fredericson argues in his exceptions that the ALJ should have given collateral estoppel effect to a September 29, 1997 decision of an Administrative Law Judge of the State Unemployment Insurance Appeals Board (UIAB), which the UIAB affirmed. Labor Law §623(2), however, prohibits giving that decision any preclusive effect.

For the reasons above, the charge is remanded to the ALJ for further proceedings consistent with our decision. SO ORDERED.

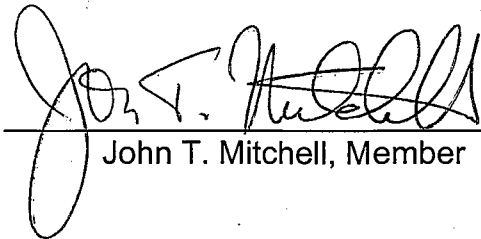
DATED: October 21, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁵Fredericson first objected to this comment by the ALJ in his exceptions. Since the conduct complained of occurred at the hearing in this matter, he should have raised an objection on the record (Rules of Procedure [Rules] § 212.4[h]), could have made a motion to the ALJ to have her recuse herself (Rules, § 212.4[g]), or could have objected to the Director of Public Employment Practice and Representation. As he never raised any objection until his exceptions, we will not address this exception, there not being any extraordinary circumstance which would permit us to reach it. See *Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 27 PERB ¶3067, at 3155 n 2.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, CITY OF ROME
UNIT, ONEIDA COUNTY LOCAL 833,**

Charging Party,

- and -

CASE NO. U-19743

CITY OF ROME,

Respondent.

**NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT of
counsel), for Charging Party**

GREGORY J. AMOROSO, CORPORATION COUNSEL, for Respondent

BOARD DECISION AND ORDER

The City of Rome (City) has filed exceptions to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, City of Rome Unit, Oneida County Local 833 (CSEA). The charge alleges that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred, to nonunit

employees, purchasing duties exclusive to CSEA's unit.¹ CSEA has filed cross-exceptions to the ALJ's decision.

The ALJ determined that the Purchasing Agent had oversight responsibilities over two functions: open market purchasing by or on behalf of City departments and open competitive bidding for goods and services over a certain dollar amount.² The ALJ found that the open market purchasing was not exclusively unit work because City department heads also made open market purchases. That aspect of the charge was dismissed. As to the open competitive bidding, the ALJ found that the Purchasing Agent performed that duty exclusively and that the City's transfer of those duties to the City Treasurer and Deputy City Treasurer, nonunit titles, violated the Act. The ALJ ordered the former Acting Purchasing Agent, Marilyn McLiesh, reinstated, with back pay.

The City excepts to the ALJ's determination that the open competitive bidding duties were performed by nonunit employees, the ALJ's failure to credit part of one witness's testimony, without giving the reasons for that decision, and the remedy the ALJ ordered. CSEA excepts to the ALJ's finding that the open market purchasing

¹The ALJ held that the City had unilaterally transferred certain duties of the Acting Purchasing Agent to the County of Oneida (County) and to nonunit employees in the City's Treasurer's Office.

²Open market purchasing requirements covered the purchase of goods for under \$5000 and services for under \$7000. Purchases could be made only after bids had been received from at least three vendors and the lowest bid was selected. Open competitive bidding covered the purchase of goods and services for more than the maximum allowed for open market purchasing and had to comply with the requirements of General Municipal Law §103. Closed bids were accepted after the specifications for the job were advertised. Bids were opened and the contract was then awarded to the lowest bidder.

responsibilities were not exclusive to its unit. It also excepts to the ALJ's findings that the charge, as amended, did not allege that the supervisory responsibilities of the Purchasing Agent had been transferred to nonunit employees, and that no evidence supported CSEA's claim that the City transferred outside the unit duties of the Deputy Assistant Purchasing Agent.

Based upon our review of the record, we affirm the ALJ's decision finding a violation, but, in part, on different grounds.

From 1986 until January 1, 1996, when she was appointed as Acting Purchasing Agent, McLiesh worked for the City as Deputy Assistant Purchasing Agent.³ As Acting Purchasing Agent, McLiesh performed all the duties of the Purchasing Agent. McLiesh testified that her primary job responsibility was supervision of the City's purchasing program. She was responsible for the open market purchasing for the City. As head of the Purchasing Department, she received requisition requests from the other department heads for goods and supplies to be purchased. In most cases, those requests came in the form of a purchase order and an invoice requiring payment for goods or supplies already received. McLiesh reviewed purchase orders for compliance with City regulations and sometimes requested additional information from the department head in support of the purchase. Once satisfied with a request, McLiesh either approved the requisition or approved payment of the invoice, which was then

³McLiesh was never permanently appointed as Purchasing Agent and she never took any Civil Service exams for the title. In August 1997, McLiesh suffered an injury and was on disability leave through the remainder of 1997 and into 1998, when the City eliminated her position as part of its transfer agreement with the County.

forwarded to the Treasurer's office for release of funds. She regularly reviewed purchases by the department heads to ensure that open market purchasing was used only where appropriate. McLiesh delegated the clerical aspects of her job to Mary Martin, a typist in the Purchasing Department, whose title is in the unit CSEA represents.

With respect to open competitive bidding, McLiesh's practice was to meet with department heads to review their specifications for materials and supplies or services. After these meetings, she wrote up the specifications in compliance with the City's competitive bidding regulations and sometimes she had the department head sign off on the specifications after Martin typed them. McLiesh then advertised the contract, opened the bids with the City Clerk, made a recommendation for acceptance of the lowest bid to the City's Board of Estimate and Control, prepared a request for legislation, and consulted with the City's corporation counsel, as necessary. She also oversaw the competitive bidding process for the sale of any surplus City property, following the same general procedures. Martin provided all the clerical assistance required by McLiesh with respect to these job duties too.

The City did not fund the Purchasing Agent position in its 1998 budget. In April 1998, the City entered into an agreement with the County whereby the County assumed responsibility for open market purchasing. Martin, transferred to the City Treasurer's Office, is now the reference person who processes purchase orders. John Nash, the City Treasurer, signs the purchase orders and requisition forms, which Martin

then sends to the County for processing.⁴ Occasionally, John McKeown, the Deputy City Treasurer, will also sign purchase orders or requisition forms. Department heads still frequently purchase materials and supplies and submit purchase orders and invoices for payment. These go through Martin for input into the computer, are reviewed by Nash or McKeown, and signed, and payment is authorized.

While there is some indication in Martin's testimony that she had and still has the primary responsibility for compiling bid specifications and working with the department heads to ensure the specifications meet their requirements,⁵ it is undisputed that McLiesh had oversight responsibility in this area. It was she who reviewed the submitted specifications to confirm that they met legal requirements⁶ and were in the proper language and form. That work is now performed by Nash or McKeown, who must give final approval to any bid packet before bids can be solicited. Martin handles the clerical aspects of advertising for bids, opening the bids and preparing the request for legislation approving the contract.

⁴Martin sends the approved requisition form to the County buyer, who identifies a vendor, enters the information and sends a copy of the completed purchase order to Martin. Nash then signs the purchasing order. When the order is filled, the invoice is returned to Martin, who processes the payment for the items, as she did when she worked in the Purchasing Department.

⁵The ALJ did not credit this part of Martin's testimony, offered during cross-examination by the City. Based upon our findings, *infra*, we need not decide whether the ALJ erred by not crediting this part of Martin's testimony.

⁶McLiesh consulted with the Corporation Counsel about any legal questions she had about bid specifications prepared by the department heads.

The seminal case on transfers of unit work, *Niagara Frontier Transportation Authority*⁷, requires in such cases that the charging party establish that the work in issue was performed exclusively by employees in its bargaining unit and that the transferred work is substantially similar to the unit's work. Over the years, our analysis of exclusivity in cases where the unit work involves multiple tasks, multiple-function jobs, or multiple locations, has come to rely upon the concept of a "discernible boundary."⁸ In order to determine whether a discernible boundary has been established around work, which may then be deemed exclusive to the unit, we assess the nature, location, and frequency of the work unit employees perform, and any tasks incidental to that work. In two recent cases involving the County of Westchester⁹, we were called upon to analyze unit positions with multi-task responsibilities to determine whether the unit's exclusivity had been breached by the performance of some of the tasks by nonunit employees. In drawing a "discernible boundary" around the unit work, we analyzed the "core components" of the work in-issue. We held in those cases that when the work intrinsic to the position, the core component, has been exclusively performed by a unit employee, the fact that tasks incidental or peripheral to the position have been

⁷18 PERB ¶3083 (1985).

⁸See *Town of West Seneca*, 19 PERB ¶3028 (1986). See also *New York City Transit Auth.*, 30 PERB ¶3004 (1997); *Clinton Community College*, 29 PERB ¶3066 (1996); *State of New York (DOCS)*, 27 PERB ¶3055 (1994); *Hudson City School Dist.*, 24 PERB ¶3039 (1991); *Indian River Cent. School Dist.*, 20 PERB ¶3047 (1987); .

⁹*County of Westchester*, 31 PERB ¶3034 (1997) and *County of Westchester*, 31 PERB ¶3035 (1997).

performed by nonunit employees will not destroy exclusivity as to the duties of the position. Likewise, when nonunit employees have performed core component duties of a position, exclusivity cannot be established even if unit employees have exclusively performed tasks incidental to the core duties of that unit position. As we noted in *Town of Brookhaven*,¹⁰ this Board has "not recognized a discernible boundary when we have been unable to identify a reasonable relationship between the components of the discernible boundary and the duties of unit employees."

Here, the ALJ correctly determined that the "core component" analysis was appropriate in determining whether CSEA had established exclusivity over the duties of the Acting Purchasing Agent. However, in analyzing the tasks performed by McLiesh as the Acting Purchasing Agent, the ALJ defined the "core" duties of the Acting Purchasing Agent as "the oversight and implementation of City purchases and sales in accordance with each step of both open market requirements and open competitive bidding procedures, including review and keeping record of related documents."¹¹ Taking each of the constituent tasks separately, the ALJ found no exclusivity as to open market purchases because department heads had also obtained prices, selected vendors and made purchases. As to open competitive bidding, the ALJ found that CSEA had demonstrated that the Acting Purchasing Agent had exclusively performed all the constituent duties.

¹⁰27 PERB ¶3063, at 3147 (1994).

¹¹32 PERB ¶4518, at 4574.

We do not define the "core component" of the duties of the Acting Purchasing Agent as the multiple tasks involved in either the open market purchases or the open competitive bidding procedures. The record is clear that the core component of the work of the Acting Purchasing Agent is the review and supervision of the two procedures. It is undisputed that only the Acting Purchasing Agent had the authority and the responsibility to review and approve purchases, payment of invoices and bid specifications for all City departments. That responsibility has been reassigned to the City Treasurer and the Deputy City Treasurer, both nonunit employees. That some of the attendant and purely clerical aspects of the Acting Purchasing Agent's job duties had been delegated to Martin does not affect exclusivity because those duties were peripheral to the core duties of the Acting Purchasing Agent position. Neither does the department heads' purchase of their own supplies or their input into the wording of bid specifications for goods or services for their departments affect exclusivity. Only McLiesh reviewed and approved purchase orders, the payment of invoices and the language of bid specifications.

We find, therefore, that the City violated §209-a.1(d) of the Act when it transferred the oversight responsibilities of the Acting Purchasing Agent to the City Treasurer and the Deputy City Treasurer.¹²

¹²The actual purchase of goods, previously done by either McLiesh or the department heads, is now performed by either the department heads or the County buyer. There is no violation as to that function because there was no exclusivity established by CSEA.

The City excepts to the remedy ordered by the ALJ that McLiesh be reinstated to perform her former duties in connection with the open competitive bidding procedures, claiming that as Acting Purchasing Agent, McLiesh had no rights to a permanent appointment, which is how the City characterizes the ALJ's order. The City further argues that at most, McLiesh should be reinstated to only a part-time position and receive only partial back pay.

As we have found that the core components of the Acting Purchasing Agent's job have been improperly transferred, we order reinstatement of McLiesh to her former, full-time position as Acting Purchasing Agent, with back pay and interest at the maximum legal rate. McLiesh will have no more right to a permanent appointment as Purchasing Agent than she did formerly. Her reinstatement to the position of Acting Purchasing Agent is contingent upon there being no list of eligible candidates established pursuant to a Civil Service exam for Purchasing Agent. By reinstating McLiesh to the Acting Purchasing Agent position, and by ordering back pay, we place McLiesh most nearly in the position she would have been in had the City not violated the Act.¹³

Based on the above, we affirm the decision of the ALJ, but on the grounds set forth herein.

¹³We do not reach CSEA's exception that the ALJ erred by not considering the supervisory responsibilities of the acting Purchasing Agent because that was not an allegation in either the original charge or the amended charge. Likewise, there is no record evidence to support CSEA's allegation that the duties of the Deputy Assistant Purchasing Agent, a vacant position, have been reassigned to nonunit employees.

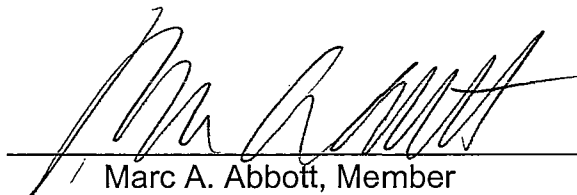
IT IS, THEREFORE, ORDERED that the City of Rome

1. Immediately restore to the unit represented by CSEA the oversight and review duties performed by the Acting Purchasing Agent;
2. Offer reinstatement to Marilyn McLiesh to her former position;
3. Make Marilyn McLiesh whole for the loss of any wages, benefits and conditions of employment, from the effective date of her separation from service to the effective date of the offer of reinstatement, if any, caused by the City's transfer of her duties to the City Treasurer and the Deputy City Treasurer, with interest at the maximum legal rate;
4. Sign and post notice in the form attached in all locations ordinarily used to post notices of information to CSEA unit employees.

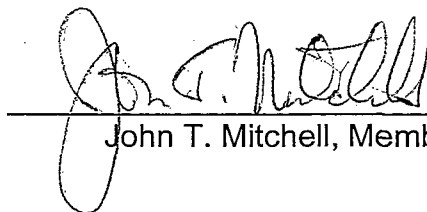
DATED: October 21, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of Rome in the unit represented by CSEA that the (employer) will forthwith:

1. Immediately restore to the unit represented by CSEA the oversight and review duties performed by the Acting Purchasing Agent;
2. Offer reinstatement to Marilyn McLiesh to her former position;
3. Make Marilyn McLiesh whole for the loss of any wages, benefits and conditions of employment, from the effective date of her separation from service to the effective date of the offer of reinstatement, if any, caused by the City's transfer of her duties to the City Treasurer and the Deputy City Treasurer, with interest at the maximum legal rate;
4. Sign and post notice in the form attached in all locations ordinarily used to post notices of information to CSEA unit employees.

Dated

By
(Representative) (Title)

City of Rome
.....

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

GREECE PART-TIME UNIT, CWA LOCAL 1170,

Charging Party,

- and -

CASE NO. U-20077

TOWN OF GREECE,

Respondent.

In the Matter of

**GREECE LIGHTHOUSE ASSOCIATION,
CWA LOCAL 1170,**

Charging Party,

- and -

CASE NO. U-20078

TOWN OF GREECE,

Respondent.

**SHAPIRO, ROSENBAUM, LIEBSCHUTZ & NELSON (PETER C. NELSON of
counsel), for Charging Parties**

JOHN M. OWENS, ESQ., for Respondent

BOARD DECISION AND ORDER

These exceptions to a decision of an Administrative Law Judge (ALJ) come to us from the Greece Part-Time Unit, CWA Local 1170 (part-time unit) and the Greece Lighthouse Association, CWA Local 1170 (full-time unit) (together, CWA). The improper

practice charges filed by CWA, Case Nos. U-20077 and U-20078, allege, as amended, that the Town of Greece (Town) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it refused to reduce to writing and execute an agreement to amend the parties' current collective bargaining agreements.¹

The ALJ found that only a tentative agreement had been reached and that, therefore, the Town had no obligation to reduce the tentative agreement to writing and execute it. The CWA excepts to the ALJ's decision, arguing that the parties reached a final agreement, that the Town Supervisor approved the language of the agreement and that, by failing to take timely action on the agreement, the Town waived any right it had to ratify the agreement. The Town supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ.

In June 1996, CWA and the Town reached agreement on a 1996-1998 contract for the full-time employees and a 1996-2001 contract for the part-time employees represented by CWA. The contracts provided that in 1996 employees would begin accruing vacation time on a monthly basis on the anniversary of their employment with the Town.² The contracts further provided that from January 1, 1996 to December 31,

¹Another improper practice charge, Case No. U-20079, filed by CWA on behalf of the Gold Badge Club, CWA Local 1170, was withdrawn at the start of the hearing in these matters.

²Employees previously received all their vacation accruals on the anniversary of their employment with the Town. Vacation leave was for use in that year and could not be carried over to the next year.

1996, employees would continue to receive the annual vacation accrual upon reaching their anniversary date, and then would commence accruing vacation leave on a monthly basis. In January 1997, employees did not receive a vacation accrual on their anniversary date; they just continued to accrue vacation on a monthly basis.

A dispute arose, however, on the method of accrual upon reaching a "milestone" anniversary date, such as the fifth anniversary of employment. Under the 1996-1998 contract for the full-time employees, an employee with two to five years of employment with the Town receives 1.25 days of vacation leave per month.³ An employee with five to ten years of employment with the Town accrues vacation leave at the rate of 1.5 days per month. Under the old contracts, on an employee's fifth anniversary, the employee received an accrual of 18 days of vacation leave. Under the new contracts, the employee began accruing at the rate of 1.5 days per month at the start of the fifth year, but would not have 18 days of vacation leave until the completion of the fifth year of employment. The CWA Vice-President, Linda McGrath, discussed this issue with Shaun Groden, the Town's Director of Finance, in March 1997. Groden told her that there were problems with the payroll system. McGrath told him that she was going to file grievances but would agree to hold them in abeyance while the payroll system problems were addressed. No further action was taken on the grievances at that time.

³The part-time employees receive a pro-rata amount of vacation leave for each year of employment. For example, an employee with four years of service accrues vacation leave at the rate of .75 of a day per month. An employee who has been employed for five years receives .92 of a day per month.

In September 1997, McGrath wrote to Town Supervisor Roger Boily requesting a meeting on the grievances.⁴ McGrath, representatives of the part-time and full-time employees, Groden, and Bernard Winterman, the Town's labor relations consultant, attended a meeting on October 8, 1997. Both Groden and McGrath testified that an agreement, encompassing both the part-time and full-time employees, was reached at that meeting to amend the contracts to reflect the parties' understanding that the higher accrual rate would commence in the year prior to the "milestone" anniversary date.

Winterman drafted the language of the parties' October 8 agreement and it was forwarded to McGrath, over Groden's signature, by a letter dated November 14, 1997.⁵

McGrath responded in a letter to Winterman dated December 19, 1997, indicating agreement with the terms of the Memorandum of Agreement and requesting that Winterman send her a copy for all the units, which the Association would then sign and return for implementation.⁶ McGrath received a telephone response from Winterman on January 6, 1998, in which he indicated that he would shortly forward the agreements to her. McGrath followed up with another letter dated February 17, 1998, in which she again requested that Winterman forward the Memorandum of Agreement to her. On February 25, McGrath again wrote to Winterman, requesting the Memorandum of

⁴The Town Supervisor is step 2 of the full-time employees' grievance procedure and step 3 of the grievance procedure for part-time employees.

⁵Groden resigned his employment with the Town effective December 1, 1997, but was on vacation during the last two weeks of November 1997.

⁶McGrath had also written to Winterman on November 26, 1997, requesting that he forward the Memorandum of Agreement to her for signature.

Agreement be sent to her for signature. Winterman called her on March 2, 1998, informing her that the Town had not authorized him to respond to her requests and suggesting that she write to Joanne Calvaruso, the Town's Director of Personnel.

Thereafter, McGrath wrote to John Auberger, the new Town Supervisor, requesting that the Town forward the Memorandum of Agreement to CWA for signature. CWA received no response from Auberger. Subsequently, Calvaruso had a conversation with Auberger, which she communicated to CWA, in which Auberger indicated he had no interest in making the changes outlined in the Memorandum of Agreement drafted by Winterman.

While Calvaruso testified at the hearing that no agreements to change or amend the language of the contracts could be final without the approval of the Town Board, Groden testified that he was authorized to act on behalf of the Town Supervisor and that he had previously settled grievances. He further testified that he had discussed the meeting and the issues with Boily and that the Memorandum of Agreement generated by Winterman accurately set forth the parties' agreement to amend the contracts. Neither Groden nor Winterman ever presented the Memorandum of Agreement to Boily or Auberger for signature. The Memorandum of Agreement was never submitted to the Town Board for ratification or approval.⁷

⁷Apart from Calvaruso's statement that the Town Board had to approve all changes in contract language, there is no evidence in the record that the Town Board ever reserved the right of ratification in this, or any other, negotiation.

The ALJ determined that at the October 8, 1997 meeting the parties reached only a tentative agreement to amend the contracts and that the parties understood that their agreement was subject to approval of final language and the approval of the Town Supervisor. In reaching this conclusion, the ALJ relied on evidence of the parties' expectations and their prior practice in amending contracts. The record, however, contains scant evidence of the parties' prior practice. One amendment to a contract was signed by the Town Supervisor and CWA's president, but there was no testimony about the amendment or how it was reached. The testimony proffered offers no clear picture of the parties' practice. Calvaruso stated that amendments to the contracts were not final until approved by the Town Board, McGrath's testimony was that either the Town Supervisor or the Personnel Director signed agreements for the Town and Groden testified that the Town Supervisor could settle grievances or make amendments to the contract.

The ALJ correctly determined that the parties had agreed that the language of the settlement was to be finalized after the meeting and that the Town would draft the final language. The November 14, 1997 letter from Groden to McGrath set forth the final language of the parties' Memorandum of Agreement. McGrath accepted the language of the Memorandum of Agreement and requested that the documents be signed and implemented as soon as possible.

While the ALJ did not address whether the tentative agreement of the parties was in settlement of a grievance or was reached pursuant to negotiations to amend the contracts, we here determine that the parties negotiated an amendment to the

contracts. CWA first raised its concerns about the implementation of the contractual provisions covering vacation accrual in March 1997. The parties agreed at that time that CWA would file grievances to preserve whatever contractual remedies it might have while the Town attempted to correct its payroll difficulties. Six months later the parties met in the context of a grievance hearing before the Town Supervisor, with Groden and Winterman representing the Town Supervisor, to resolve CWA's concerns about the implementation of the vacation accrual provisions of the contracts. During those negotiations in settlement of CWA's grievances, the parties agreed to amend the contracts to clarify their understanding of the implementation of the vacation leave accrual provisions in a "milestone" anniversary year. We find that the agreement reached between CWA and the Town was to amend the contracts and that, therefore, the duty to negotiate in good faith and to execute the agreement applies.⁸

Having concluded that the parties had the duty to negotiate in good faith in these cases, our inquiry turns to an examination of the parties' conduct and expectations. It is undisputed that the parties reached agreement on October 8, 1997, to amend the contracts regarding the accrual of vacation leave in a "milestone" anniversary year. The record further supports a conclusion that Groden was authorized to enter into such an agreement by and on behalf of the Town Supervisor. CWA and the Town also agreed

⁸*Cf. Local 1170 of the Communications Workers of America*, 23 PERB ¶3004 (1990). In that case, it was determined that the execution of an agreement in settlement of a disciplinary grievance was not governed by §204.3 of the Act, which provides that "to negotiate collectively" includes "the execution of a written agreement incorporating any agreement reached if requested by either party." The settlement of the disciplinary grievance in that matter did not involve an amendment to the parties' contract.

that the Town would draft the language of the amendments to the part-time and full-time contracts. A Memorandum of Agreement was drafted by Winterman, was sent to the CWA by Groden's office and purported to memorialize the parties' agreements. Groden acknowledged that the Memorandum of Agreement reflected his understanding of the parties' agreement. McGrath agreed to the language on behalf of the CWA.

Once CWA indicated its acceptance of the Memorandum of Agreement and requested that a formal document reflecting the amendments to the contracts be prepared and executed, the Town was required by §204.3 of the Act to comply with CWA's request.⁹ Having found that the parties reached an agreement, the Town's failure to produce the requested document violated the Act. As stated in *Newburgh*

Enlarged City School District:

Having agreed to prepare the final contract for signature, the District's duty to negotiate necessitated the delivery of a document which accurately incorporated the parties' agreements.¹⁰

To the extent that the Town Supervisor had the right to ratify the agreement reached by his representatives, Groden and Winterman, the Town's team had the obligation to present the Memorandum of Agreement to him for his ratification and to

⁹See *Deer Park Teachers Ass'n*, 13 PERB ¶3048 (1980).

¹⁰21 PERB ¶4521, at 4558, *aff'd*, 21 PERB ¶3036 (1988), *conf'd sub nom. Bd. of Educ. of the Newburgh Enlarged City Sch. Dist v. PERB*, 22 PERB ¶7009 (Sup. Ct., Alb. Co. 1989); *motion to dismiss appeal granted by default*, 25 PERB ¶7008 (3d Dep't 1992).

support the agreement reached with CWA.¹¹ Neither Groden or Winterman did so. Calvaruso's discussion with Auberger sometime in February or March 1998 is insufficient to satisfy this obligation. Further, to the extent that the Town Board had any right to ratify the agreement, the record makes clear that neither Groden nor Winterman ever submitted the Memorandum of Agreement to the Town Board, much less supported it.¹² The Town, therefore, waived any right it might have had to ratification of the Memorandum of Agreement.^{13 14}

¹¹See *Civil Service Employees Ass'n, Local 1000, and County of Nassau*, 29 PERB ¶3035 (1996).

¹²See *Jamesville-Dewitt Cent. Sch. Dist.*, 22 PERB ¶3048 (1989).

¹³While it could be argued that the election of a new Town Supervisor and the new Town Board necessitated some delay in presenting the Memorandum of Agreement to the Town Supervisor, the Town does not raise this as a defense and no evidence to this effect is in this record. Indeed, the Town never advised CWA that the delay in finalizing the agreements was attributable to the new Town Supervisor taking office or the change in the composition of the Town Board. As we held in *City of Dunkirk*, 25 PERB ¶3029, at 3061 (1992): "[R]atification, being part of the bargaining process, is subject to the same standards of good faith as govern the bargaining itself. Reasonable expedition is no less expected in ratification than in bargaining, and that reasonableness is similarly judged by the totality of circumstances under the facts of each case."

¹⁴While we find that the Town has waived any right it might have had to ratification of the agreement, whether the Town Board can or did waive any right of legislative approval of the agreement is not for us to decide in the context of this improper practice charge, as it is immaterial to the refusal to execute charge before us. See *Bd. of Educ. of the City Sch. Dist. of the City of Buffalo*, 24 PERB ¶3033, at 3067 (1991), where we held:

There is no statutory right or duty to ratify a tentative collective bargaining agreement. The right to ratify stems from the negotiators' reservation of that right as a condition precedent to the statutory duty to execute the contract on demand.... The right to ratify, having been created by the negotiators, can be waived by the negotiators' conduct if it falls below the minimum we have mandated. If the negotiators' conduct is improper, they lose any right to have the third party ratify their actions and the

The parties reached agreement in October 1997 to amend the language of the full-time and part-time contracts relating to the accrual of vacation leave in "milestone" anniversary years. Despite repeated requests from CWA, the Town failed to prepare the final documents and submit them to the Town Supervisor or the Town Board. We find, therefore, that the Town violated §209-a.1(d) of the Act by failing to prepare and submit to CWA documents incorporating the October 8, 1997 agreement and by failing to support the agreement at ratification.

Based on the above, we grant CWA's exceptions and reverse the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the Town of Greece:

1. Prepare and submit to the CWA documents incorporating the agreement reached on October 8, 1997 to amend the language of the full-time and part-time contracts relating to the accrual of vacation leave in "milestone" anniversary years, as set forth in the Town's November 14, 1997 letter to CWA;

(Footnote 14 continued)

negotiators' duty to execute the agreement they have reached becomes fixed upon tender of a document which accurately embodies the parties' agreements reached during negotiations.

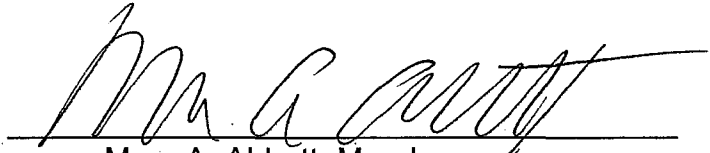
The right and duty of a legislative body of a public employer to approve legislatively certain terms of an agreement arises by statute and exists independently from any action by the negotiators, who represent the executive branch of government within which the right and duty to bargain is lodged. Unlike ratification, however, legislative approval is required only for certain terms of an agreement. Moreover, legislative approval is a right that belongs to the legislative body, not to the negotiators.

2. Execute, upon CWA's demand, documents incorporating said agreement;
3. Sign and post the attached notice at all locations used by it for written communication to members of the full-time and part-time units.

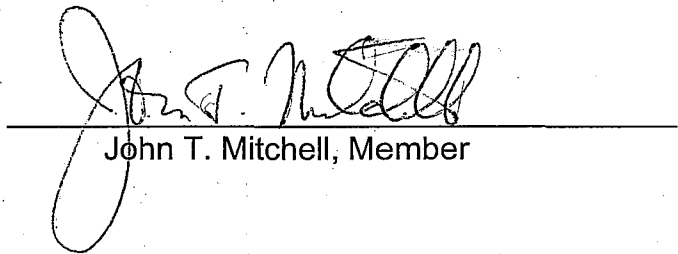
DATED: October 21, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Town of Greece (Town) in the units represented by the Greece Part-Time Unit, CWA Local 1170 and Greece Lighthouse Association, CWA Local 1179 (CWA) that the Town will forthwith:

1. Prepare and submit to the CWA documents incorporating the agreement reached on October 8, 1997 to amend the language of the full-time and part-time contracts relating to the accrual of vacation leave in "milestone" anniversary years, as set forth in the Town's November 14, 1997 letter to CWA.
2. Execute, upon CWA's demand, documents incorporating said agreement.

Dated

By
(Representative) (Title)

TOWN OF GREECE
.....

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

JANICE ALLEN,

Charging Party,

- and -

CASE NO. U-20461

CHENANGO FORKS CENTRAL SCHOOL DISTRICT,

Respondent.

**JOHN B. SCHAMEL, FIELD REPRESENTATIVE, NATIONAL EDUCATION
ASSOCIATION OF NEW YORK, for Charging Party**

HOGAN & SARZYNSKI, LLP (JOHN P. LYNCH of counsel), for Respondent

BOARD DECISION AND ORDER

Janice Allen has filed exceptions to a decision of an Administrative Law Judge (ALJ) dismissing Allen's improper practice charge. The Scholastic Bus Company (SBC), a private company, began providing school bus services to the Chenango Forks Central School District (District) in 1997. The charge alleged that the District violated §209-a(1)(a) and (c) of the Public Employees' Fair Employment Act (Act) by notifying SBC that the District would not approve Allen as a school bus driver for the 1998-99 school year.

After a pre-hearing conference, the ALJ directed the parties to file briefs addressing the issue of whether the Act protects an individual in private employment under the circumstances alleged in the charge. After reviewing the briefs, the ALJ

dismissed the charge, holding that the Act's protections under §209-a.1(a) and (c) do not extend to individuals engaged solely in private employment.

Allen was president of the Chenango Forks Transportation Association (Association). Her exceptions argue that she was not solely in private employment, and that the ALJ erred in not recognizing that a continuing relationship existed between the District and the Association until they signed a retroactive collective bargaining agreement in June 1996. Allen also argues that the ALJ erred in failing to consider the significance of the timing of the signing of the retroactive agreement in relation to the notice to SBC from the District's superintendent, W. Edward Ermlich, that the District would not approve Allen as a driver for the 1998-99 school year. The District argues in response that the ALJ's decision is correct and should be affirmed.

Upon review of the parties' arguments, we affirm the ALJ's decision and dismiss the charge.

In considering the appropriateness of such a dismissal by an ALJ, all of the allegations of the charge are deemed to be true.¹ The issue is whether the facts alleged in the charge may constitute an improper practice.² In making that determination, the charging party is entitled to all reasonable inferences that can be drawn from the pleaded facts.³

¹*Professional Fire Fighters Ass'n, Local 274 (Bridgham)*, 23 PERB ¶3021, at 3041 n.2 (1990).

²*City of Yonkers*, 23 PERB ¶3055, at 3117 n. 2 (1990).

³*Id.*

The charge alleges that Allen is a former bus driver for the District, having worked there for 25 years. For at least the five years before filing the charge, she was the president of the Association. As president, she was responsible for filing one court case and three improper practice charges against the District. On July 1, 1997, the District subcontracted its school bus services to SBC.

The charge further alleges that SBC hired Allen as a bus driver for the 1997-98 school year, but she continued as a member of the Association's negotiating team for a 1995-97 collective bargaining agreement with the District. Those negotiations ran from June 19, 1995 to June 26, 1998. On May 29, 1998, an incident involving a student's conduct occurred on Allen's bus. On June 25, 1998, after meetings and correspondence regarding the incident, SBC's general manager still offered Allen continued employment for the 1998-99 school year. The next day, Ermlich and Allen signed the retroactive 1995-97 agreement, and on that same day, Ermlich notified SBC that, pursuant to their contract, the District was disapproving Allen's employment as a bus driver for the next school year. He gave Allen's handling of the May incident as the reason. Allen alleges that but for her protected activity as president of the Association, which continued during the negotiations for the retroactive agreement, the District would not have disapproved her employment as a bus driver for SBC.

Section 209-a.1(a) of the Act makes it an improper practice "to interfere with, restrain or coerce public employees" in the exercise of their rights guaranteed by §202 of the Act. Section 209-a.1(c) makes it an improper practice "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or

participation in the activities of, any employee organization." We agree with the ALJ that the use of *employee* in subdivision "c", as contrasted with the use of *public employee* in subdivision "a", is not significant. The public policy of the Act is "to promote harmonious and cooperative relationships between government and its employees." The Legislature sought to achieve that end, in relevant part, by "granting to public employees the right of organization and representation."⁴ The use of *employee* in §209-a.1(c) takes its meaning from its context in the Act, which addresses only public employment.⁵

However, as the ALJ's decision also correctly noted, our decisions hold that a lack of present public employee status, standing alone, is not an absolute basis for dismissing an improper practice charge. Therefore, we have upheld the processing of charges filed by or on behalf of individuals seeking public employment⁶ and individuals seeking to regain their public employment,⁷ but only where doing so was consistent with the purposes and policies of the Act.

Here, however, Allen was not a public employee either at the time of the alleged discrimination or at the time she filed her charge, and most importantly, the charge

⁴Act §200.

⁵See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); McKinney's Statutes §235 (When a word is susceptible to two or more significations, its meaning must be determined from the context of the statute, the purpose and the spirit of it, and the intention of the lawmakers.)

⁶See, e.g., *Canadaigua City Sch. Dist.*, 27 PERB ¶13046 (1994).

⁷See, e.g., *Town of Gates*, 15 PERB ¶13079 (1982).

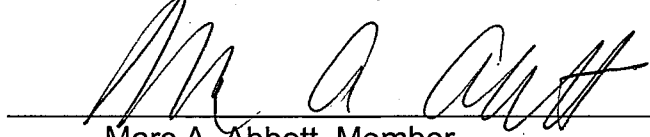
does not allege discrimination in regard to public employment.⁸ The charge itself alleges that Allen's public employment ended more than a year before she filed her charge. Accordingly, based on the purposes and the policies of the Act, we hold that a improper practice charge filed by an individual who is not a public employee, alleging interference or discrimination that occurred well after the individual's public employment ended, and which allegedly affected that individual's private employment alone, does not state a *prima facie* charge under either §209-a.1(a) or (c) of the Act. That the District may have based its alleged conduct on alleged protected activity related to Allen's earlier public employment does not make that public employment the object of the alleged discrimination or interference.

IT IS, THEREFORE, ORDERED that the charge is dismissed in its entirety.

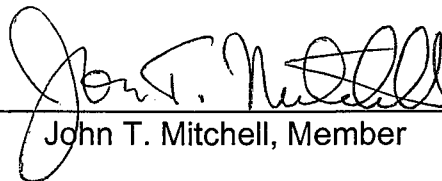
DATED: October 21, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁸See *Jacob K. Javits Convention Ctr. of New York and/or Ogden Allied Facility Maintenance Corp.*, 20 PERB ¶3030 (1987) (ALJ properly dismissed charge, which, as pleaded, required dismissal on the ground that the employment in question was in the private sector.)

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

AMARIO A. ANDRE, JR.,

Charging Party,

- and -

CASE NO. U-20480

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

AMARIO A. ANDRE, JR., *pro se*

**MARTIN B. SCHNABEL, GENERAL COUNSEL (KAY-ANN PORTER of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Amario A. Andre, Jr. to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge which alleged that the New York City Transit Authority (Authority) violated §209-a.1(a), (b) and (d) of the Public Employees' Fair Employment Act (Act) when it sought to terminate him for his exercise of protected rights. At the hearing in this matter, the Authority, at the close of Andre's direct case, made a motion to dismiss for failure to establish a *prima facie* case. Both parties filed briefs on the motion. The ALJ granted the motion and dismissed the charge. The ALJ found that Andre had no standing to allege a violation of §209-a.1(b) or (d) of the Act and that Andre had failed to prove any of the alleged violations of the Act.

Andre excepts to the ALJ's decision, arguing that the ALJ erred in dismissing his charge. The Authority supports the ALJ's determination.

Based upon our review of the record and our consideration of the parties' arguments, we affirm, in part, and reverse, in part, the decision of the ALJ.

Andre is employed by the Authority as a bus operator. On November 16, 1998, Andre was called to the office of his supervisor at that time, Gerard Mack, because a sick leave application form Andre had submitted had been marked "fraudulent" by the Authority's absentee control office and returned to Mack. Mack advised Andre that he was to be suspended and dismissed.

Andre grieved the disciplinary charge and the penalty was modified to a ten-day suspension. Thereafter, the Authority determined that the sick leave application was not fraudulent and the charges were dropped, and Andre was compensated for the days he was on suspension.¹

Andre alleged at the hearing that in 1996 he had filed a Notice of Violation of Employee's Rights with his employee organization, the Transport Workers Union of America, Local 100 (TWU), complaining about harassment by Mack. He was unable to

¹Andre had submitted an application stating that he had been treated at the Pocono Medical Center (Center). He was not sure of the doctor's name, but he thought his name was "Dr. Mayo". He did not include the physician's tax ID number or the physician's stamp, as required by the Authority. The application was not submitted to Mack but, in accordance with the Authority's procedures, it was submitted to the General Dispatcher at Andre's depot. Because Andre had not provided all of the required information, his application was scrutinized by the absentee control office. The absentee control office then determined that there was no "Dr. Mayo" at the Center. The Authority was later able to confirm Andre's claim of treatment at the Center on the days in question by "Dr. Lazo".

provide a copy of the letter at the hearing or to testify that he had served Mack with the Notice or that Mack had ever seen the Notice.² It is the filing of the Notice that Andre points to as the protected activity that caused Mack to seek his termination because of the sick leave application.

Initially, we affirm the ALJ's dismissal of the §209-a.1(d) allegation as Andre lacks standing to file such a charge. To the extent that the ALJ dismissed the alleged §209-a.1(b) violation for lack of standing, the ALJ's decision is reversed. An individual employee does have standing to allege such a violation by a public employer.³

The alleged §209-a.1(a) and §209-a.1(b) violations must be dismissed because Andre failed to introduce any evidence that would establish that any conduct undertaken by the Authority against him was attributable to the exercise of his rights under the Act. Assuming that Andre's filing of the Notice was a protected activity, the record is devoid of any evidence which, even read in the light most favorable to Andre,⁴

²Andre attached three documents to his brief to the ALJ. One is a letter from the TWU to the Authority alleging that Andre's rights had been violated, the second is a letter from the Authority to the TWU in response and the third is a hand-written document by Andre, purporting to be the Notice, but which contains the notation on the last page "not sent". As the three documents were not in evidence, they were not considered by the ALJ. As they were not part of the record before the ALJ, we likewise do not consider them.

³"The Taylor Law affords certain rights and protections to public employees. These are specified in §§202 and 203 of the statute and comprise the right of employees to organize, and to be represented in the negotiation of agreements and the administration of grievances arising thereunder. Violation of these rights by public employers or employee organizations constitute violations of §209-a.1(a), (b) and (c) and §209-a.2(a) of the Taylor Law respectively." *Bd. of Educ. of the City Sch. Dist. of the City of New York and United Fed'n of Teachers*, 19 PERB ¶3006, at 3010 (1986).

⁴See *County of Nassau (Police Dep't)*, 17 PERB ¶3013 (1984).

would establish that Mack knew that the Notice had been filed in 1996 and that he would not have taken disciplinary action against Andre "but for" the filing of that Notice.⁵

While Andre alleges that he was treated unfairly by Mack in the handling of his sick leave application and the subsequent handling of the disciplinary charges arising thereunder, as we have previously held, "discipline, by itself, even if it is considered 'unfair' upon some standard, does not violate the Act without linkage by cause or effect to statutorily protected rights."⁶

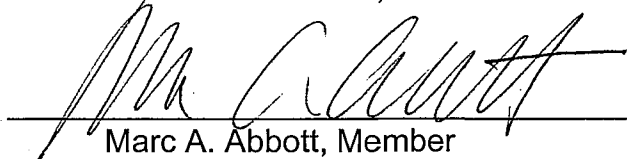
Based on the foregoing, the exceptions are dismissed and the decision of the ALJ is affirmed, except as noted.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

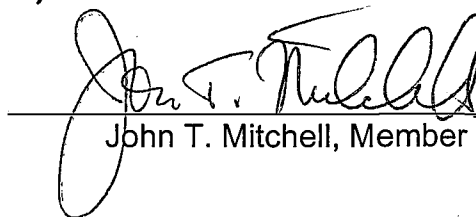
DATED: October 21, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁵See *Town of North Hempstead*, 32 PERB ¶3006 (1999).

⁶*New York City Transit Auth.*, 32 PERB ¶3010, at 3019 (1999), citing to *Green Chimney's Children's Servs.*, 31 PERB ¶3014, at 3025-26 (1998).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

CHARLES ASAMOAH,

Charging Party,

- and -

CASE NO. U-20785

TRANSPORT WORKERS UNION, LOCAL 100,

Respondent.

CHARLES ASAMOAH, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Charles Asamoah to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge which alleged that the Transport Workers Union, Local 100 (TWU) violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it caused him to be placed in the wrong rank on a seniority list in 1997 and did not rectify the situation in 1998 or 1999. Asamoah was notified that the charge was deficient. He thereafter filed an amended charge. Finding that the charge was untimely, the Director dismissed it.

Asamoah is employed by the New York City Transit Authority (Authority) and is in a unit represented by the TWU. The TWU maintains a seniority list of employees that is updated annually and is used as the basis for assignment, work location, vacation

and overtime picks. Asamoah alleges that, as a result of participating in a training program leading to a promotion, the TWU placed him at the bottom of the seniority list in 1997. He and other employees filed a grievance and were advised by Joseph Reilly, Director of Finance and Personnel for the Authority, that in the first year after a promotion, employees are placed on the bottom of the seniority list, but in the second year after a promotion, employees are placed based upon their original seniority date. In 1998 Asamoah was on the bottom of the seniority list, but when the list was published in 1999, he was not restored to his original seniority date.

The Director determined that the wrong complained of in the charge and the amendment was Asamoah's seniority placement, which occurred originally in 1997. As that was more than four months prior to the filing of the improper practice charge,¹ the Director dismissed the charge as untimely, finding that the subsequent lists published in 1998 and 1999 were reaffirmations of the 1997 list and did not extend Asamoah's time to file.

Asamoah excepts to the Director's decision, arguing that he could not know that the TWU would not comply with the practice articulated by Reilly until the 1999 list was published. Asamoah also argues that some other employees of the Authority received the proper seniority date in 1999.

Based upon our review of the record and our consideration of Asamoah's arguments, we reverse the decision of the Director.

¹Section 204.1(a) of PERB's Rules of Procedure requires that an improper practice charge be filed within four months of the act or acts alleged to be improper.

Asamoah's amended charge alleges that the practice has been that when an employee is promoted to a new position, he or she is placed at the bottom of the TWU managed seniority list for the first year following the promotion. In the second year after the promotion, the employee is restored to his or her original seniority date. Asamoah alleges that, pursuant to this practice, he was to be restored to his original seniority date in February or March 1999 when the 1999 seniority list was published. When he was again placed at the bottom of the seniority list, he filed the instant charge.

The Director read the charge as complaining about Asamoah's assignment in 1999 once again to the bottom of the seniority list, the same action taken by TWU in 1997 and 1998. However, the action taken by the TWU in 1999 was significantly different from its actions in 1997 and 1998. Asamoah alleges that in 1999 the TWU, contrary to established practice, failed to restore him to his original seniority date on the seniority list. As he could not have known that the TWU would act contrary to the alleged practice until the list was published in February or March 1999, he could not have filed an improper practice charge alleging that the TWU had changed the practice before that time.² His charge, filed on April 2, 1999, is, therefore, timely.

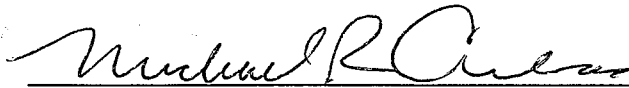
Given the ground for his dismissal of the charge, the Director did not make any findings of fact or conclusions of law on the merits of Asamoah's allegations or

²"When considering the timeliness of a charge, the inquiry is to the charging party's knowledge, actual or constructive, regarding the conduct constituting the claimed impropriety. The inquiry is whether the charging party knew or should have known of the conduct alleged to constitute the improper practice more than four months before the date the charging party files the charge." *Inc. Village of Rockville Centre*, 28 PERB ¶3056, at 3129 (1995).

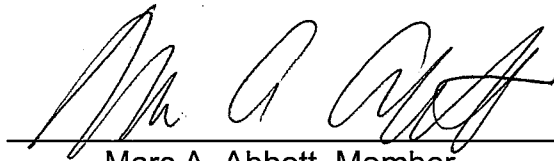
arguments. While we make no findings on the merits of the charge, under the circumstances, a remand to the Director is necessary and appropriate.

IT IS, THEREFORE, ORDERED that the case must be, and hereby is, remanded to the Director for further processing consistent with the terms of our decision and order herein.

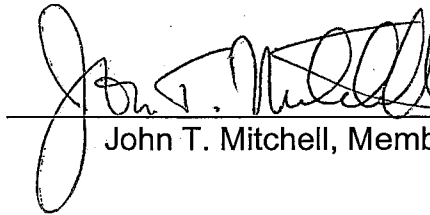
DATED: October 21, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**NEW YORK STATE SUPREME COURT OFFICERS
ASSOCIATION, ILA,**

Charging Party,

- and -

CASE NO. U-20930

**NEW YORK STATE OFFICE OF COURT
ADMINISTRATION,**

Respondent.

**KENNEDY, SCHWARTZ & CURE, P.C. (IRA CURE of counsel), for Charging
Party**

BOARD DECISION AND ORDER

The New York State Supreme Court Officers Association, ILA (Association) has filed exceptions to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its amended charge.

After the Association originally filed the charge, the Office of Public Employment Practices and Representation issued a deficiency notice. It identified three deficiencies: (1) the pleaded facts did not establish the improper motivation required to establish a violation of §209-a.1(a) of the Public Employees' Fair Employment Act (Act); (2) to the extent the charge alleged a violation of an agreement regarding defibrillator training,

PERB had no jurisdiction; and (3) the decision to provide duty-time training is not mandatorily negotiable.

The Association then filed an amended charge. As amended, the charge alleges, as it did originally, that the New York State Office of Court Administration (OCA) violated §209-a.1(a) and (d) of the Act by starting to train bargaining unit employees in the use of defibrillators, despite having agreed not to start before the parties completed negotiations on compensation for that training. But the amended charge also alleged for the first time that OCA had negotiated in bad faith "over the terms and conditions of employment concerning the wages employees would receive following the training," and that this was a mandatory subject of bargaining.

The Director found that the amended charge did not plead any facts that would, if proven, establish the violations alleged. He found that the pleaded facts demonstrated, at best, only the breach of an agreement over which PERB lacked jurisdiction, and that the alleged breach was not, in itself, evidence of the improper motivation necessary to establish that OCA violated §209-a.1(a) of the Act. The Director also noted that the decision to implement the defibrillator training was a managerial prerogative, and that the charge did not allege that OCA refused to continue to negotiate the impact of defibrillator training after it started.

The Association excepts to the Director's decision, arguing that the alleged violation had a direct impact on the wages and conditions of employment; that we have

jurisdiction; that there is no transcript;¹ and that the charge raises otherwise unspecified "statutory issues" that the Board should determine. OCA did not answer the charge and did not respond to the exceptions.

After reviewing the amended charge and the Association's arguments, we affirm the Director's decision.

Where a charging party takes exceptions from the Director's dismissal of a charge under §204.2(a) of the Rules of Procedure (Rules), the issue is whether the facts alleged in the charge may constitute an improper practice.² In making that determination, the charging party is entitled to all reasonable inferences that can be drawn from the pleaded facts.³ This test asks whether the pleaded facts can support the alleged violation under any recognized or acceptable legal theory.⁴

The Director correctly concluded that to the extent the charge alleges that OCA violated the Act by starting the training despite agreeing not to, we do not have jurisdiction.⁵ Neither does the charge allege any facts that could establish, if proven at a

¹Under §204.2(a) of our Rules of Procedure the determination whether a charge is sufficiently pleaded is made by the Director, not at a hearing. Therefore, there is no transcript. This rule has been held "not only reasonable but necessary." *Matter of Wappingers Cent. Sch. Dist. v PERB*, 77 Misc.2d 472, 474, 7 PERB ¶7004 (Sup. Ct. Albany County 1974).

²*City of Yonkers*, 23 PERB ¶3055 (1990).

³*Id.*

⁴*State of New York (Office of Mental Health)*, 24 PERB ¶3004 (1991).

⁵Act §205.5(d).

hearing, that OCA acted to deprive employees of their right under §202 of the Act to form, join, and participate in an employee organization, or not to do so.⁶

It appears from the amendment to the charge, however, that the focus of the charge is a demand, presumably for an increase in wages, that the Association made in the parties' negotiations for a collective bargaining agreement. The Association's charge then can also be reasonably read to allege that OCA negotiated in bad faith by starting the training while a demand for increased wages, based on that training, was on the table. To that extent, the charge alleges nothing more than that OCA violated §209-a.1(d) of the Act by unilaterally starting the defibrillator training. And to that extent, it is deficient because, as the Director found, the decision to train, without more, is a managerial prerogative, and thus a nonmandatory subject of negotiation.⁷

The Association also argues in its exceptions that "the alleged violation had a direct impact on the wages and conditions of employment," and that the Director therefore incorrectly concluded that the charge did not allege a violation of §209-a.1(d). The charge itself, however, does not allege that the Association demanded to bargain the impact of the exercise of a managerial prerogative,⁸ or even that any such impact

⁶See Act §209-a.1(a).

⁷*Dobbs Ferry Police Ass'n, Inc.*, 22 PERB ¶13039, *aff'g* 22 PERB ¶14516 (1989); *See City of Cohoes*, 31 PERB ¶13020 (1998).

⁸*See County of Suffolk and Sheriff of Suffolk County*, 29 PERB ¶13002 (1996), *Lackawanna City Sch. Dist.*, 28 PERB ¶13023 (1995).

"inevitably or necessarily" arose from OCA's exercise of a prerogative.⁹ In these circumstances, we cannot find that the Association has sufficiently pleaded a failure to negotiate impact.

Based on the above, the Association's exceptions are denied and the Director's decision is affirmed.

IT IS, THEREFORE, ORDERED that the charge is dismissed in its entirety.

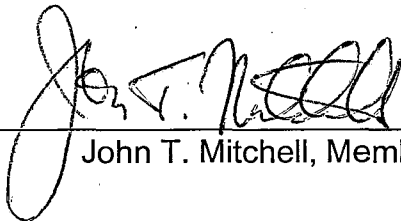
DATED: October 21, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁹ See *County of Nassau (Nassau County Police Dep't)*, 27 PERB ¶3054, at 3120 (1994).